

MINUTES
INSOLVENCY LAW COMMITTEE
OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA

December 16, 2004

The regularly scheduled meeting of the Insolvency Law Committee of the Business Law Section of the State Bar of California was held on December 16, 2004, at the offices of Reed Smith LLP in Century City, California. The following members attended the meeting in person (either at Reed Smith's offices or at satellite sites at Wendel Rosen Black & Dean in Oakland, California or Procopio Cory Hargreaves & Savitch LLP in San Diego, California) or by telephone:

Peter Bronson
Molly Baier
Elizabeth Berke-Dreyfuss
Sharon Dutton
Lisa Fenning
Robert Franklin
Barry Glaser
Michael Koch
Howard Kollitz
Donna Parkinson
Paul Pascuzzi
Malhar Pagay

Mark Porter
Maria Pum
Daniel Schechter
David Shemano
Clifford Stevens
Edward Tredinnick
Mary Jo Wiggins
Craig Wolfe

Russell Clementson (Ex Officio)
Rob Harris (ExComm Liaison)

The following members did not attend the meeting without advance notice: Mike Buckley, Eve Karasik and Colin Wied. Sandy Lavigna (Ex-Officio) did not attend the meeting with advance notice.

Peter Bronson called the meeting to order at approximately 10:00 a.m.

1. Approval of Minutes: November 12, 2004.

The minutes of the November 12, 2004 meeting were approved with corrections.

2. Membership.

The Chair noted that there are two open seats on the Committee and that proposals for candidates to fill the slots should be sent to him. The Chair also noted that a check of the State Bar records showed that Eric Sagerman is no longer a member of the Committee.

3. Meeting Schedule.

The Chair noted that he circulated a revised meeting schedule on which the only change was the switch of the host sites for (i) the January meeting from San Diego to Oakland to permit in-person participation by members attending the Winter SEI and (ii) the April meeting from Oakland to San Diego, each as approved at the November meeting. The Chair also indicated he intends to make it a general practice to circulate meeting materials one week in advance of scheduled meetings. Members should plan accordingly if they intend to provide materials for inclusion in meeting packets. The Chair

proposed that the Committee schedule the first meeting in the next term as a convenient transition for next year's Chair, and without objection, the Committee retained the presently scheduled October 14, 2005 date for this meeting.

4. Budget.

The Chair also noted the he had circulated a revised Committee budget for 2004-2005.

5. Education Subcommittee Report.

Elizabeth Berke-Dreyfuss reported to the Committee on behalf of the Education Subcommittee.

A. Winter SEI.

Elizabeth first reported that preparations are complete for the "Bankruptcy 101" program at the Winter SEI; materials are going to the Bar today. The panelists are Elizabeth, Judge Leslie Tchaikovsky and Howard Kollitz.

B. State Bar 2005 Annual Meeting.

Elizabeth reported that, after meeting in the first week of December to discuss potential programs for the September 2005 Annual Meeting, the Subcommittee had the following topics to recommend, order as follows based on appeal to general practitioners: 1) Family Law and Bankruptcy; 2) a Chapter 13 overview program; 3) Enforcement of Judgments; and 4) Bankruptcy Taxation (which had been proposed for the Winter SEI and not selected.)

Taking note of the Committee's expressed interest in presenting jointly with other standing committees, Elizabeth had contacted representatives of the Family Law Committee and the Litigation Committee, each of whom expressed interested in a joint presentation. The Litigation Committee will send Elizabeth the requirements for joint presentations with their committee. Elizabeth also suggested speakers should be selected from Southern California where possible, since the next Annual Meeting is there, and Section guidelines do not permit travel reimbursement. Rob Harris confirmed the deadline for submission of topics as January 31, 2005 (previously announced as January 25th) and for submission of materials and designation of speakers as April 30, 2005. The Committee then discussed the proposals.

With regard to Family Law and Bankruptcy, members noted that Judy Gibbs and Radmilla Fulton, former members of the Committee, presented a successful program on this topic approximately two years ago. The Chair noted similar success on the topic by the Beverly Hills Bar. Lisa Fenning indicated that the intersection of these two areas of law presents difficult issues. She suggested that someone competent with divorce and business bankruptcies be on the program, because significant difficulties arise where bankruptcy of a family business and divorce come together. It was suggested that the California Family Law Commissioner might be approached as a potential speaker.

With regard to the Chapter 13 overview program, the Committee discussed whether the topic had broad enough appeal. Elizabeth suggested that a primer ("what every lawyer needs to know about Chapter 13") would provide valuable information, in light of the ongoing efforts, including those in the Bankruptcy Reform Act, to push eligible individual debtors toward Chapter 13. Donna Parkinson suggested that Judge McManus in Sacramento had worked extensively on Chapter 13 and might be a

potential speaker. Mark Porter suggested that even if the attendance was not high, obtaining the primer presentation on tape and putting it on the Bar's website could be useful if the noted push toward Chapter 13 continues. Mike Koch volunteered to ask Chapter 13 trustee's lawyers in the Southern District of California if they might be available as presenters.

With regard to Bankruptcy Taxation, Elizabeth indicated she actually preferred this topic over Enforcement of Judgments, though the Subcommittee thought the latter topic had broader appeal. Donna Parkinson volunteered to work on the program, if it is selected. With regard to Enforcement of Judgments, Mark Porter suggested that if the Litigation Committee wants to work on the program, perhaps they should carry the submission and the Committee could participate in preparing and presenting it.

The Committee then agreed to submit three proposed topics in the following order for programs of the respective lengths:

- Family Law and Bankruptcy (3 hours);
- Chapter 13 Primer (2 hours);
- Bankruptcy Taxation (2 hours).

C. Other Possible Programs.

Finally, the Committee discussed webcasts and programs available over the web. Elizabeth reported that Pam Wilson from the Bar had told her that they taped the Committee's Bankruptcy Fraud program at the 2004 Annual Meeting, but that the videographer had had camera trouble, and the Bar is assessing which programs were affected. Liz also noted that the Bar website offers a number of programs from other bar associates and the Bar gets a portion of the price paid by viewers for the presentations. The Committee then discussed whether the Bar has streaming video (i.e., live programs broadcast as they occur) capacity, and learned that the Bar views this as technologically difficult at present. Streamed programs would be archived in any event. The Bar generally relies on recorded video programs offered for viewing on its website. Viewers may purchase the right to review a recorded video and use it for up to 90 days. Rob Harris questioned whether streaming video would permit viewers to obtain MCLE participation credit, rather than self-study credit, if the streaming video included a participation mechanism (as PLI does). The Chair suggested the consensus of the Committee was that streaming video was not worth pursuing over recorded videos available on the Bar website, but Liz will follow up with Pam to determine if (1) participation is possible for viewers of streaming video and (2) whether MCLE credit for streaming video differs from credit available with recorded video.

6. Business Law News

The Chair introduced Jim Menton of Peitzman Weg & Kempinsky LLP, an editor of the Business Law News ("**BLN**"). He indicated that the BLN Spring edition will be devoted to bankruptcy issues. The editors are looking for articles on the topic, and already have commitments on 1) purchases of assets in bankruptcy and 2) why Chapter 11 cases are not being filed locally. Topics need not be California specific. Articles should be 2,500 words in length and submitted to him (jmenton@pwk.llp.com) or to Katherine Bowman, the co-editor of this edition, by March 31, 2005. Interested authors can get formatting guides upon request, and publication of accepted articles should occur within one to two months of submission.

7. Legislation and Current Projects.

The Committee turned next to matters related to current legislative projects. The Chair agreed to send Mike Koch, the Subcommittee Chair, that portion of the Chair Manual dealing with the Committee's participation in the legislative process.

A. CUFTA

Dan Schechter reported on the ALP to correct numbering in the California Uniform Fraudulent Transfer Act necessitated by adoption of amendments to California Civil Code Section 3439.01. The Committee approved proceeding with the proposal. Rob Harris suggested that the ALP be drafted and sent by email to Jeff Selman at Heller Ehrman White & McAuliffe for ExComm consideration at ExComm's meeting the following day on December 17, 2004 or as soon thereafter as possible.

B. Attachment Liens

The Committee then continued its discussion of Dan Schechter's ALP to amend California Code of Civil Procedure Section 697.070 to address the holding in *Southern California Plastics, Inc.*, 165 F.3d 12443 (9th Cir. 1999). In that case, the court held that allowance of a claim in bankruptcy was insufficient to satisfy a necessary judgment requirement for perfection of a California attachment lien; an actual California judgment is required. In order to overcome the procedural problems this holding imposes on plaintiffs who have not obtained a judgment pre-petition, the above ALP proposes to treat the order actually allowing the underlying claim after hearing in bankruptcy (but not claims merely deemed allowed through filing or scheduling without objection) as a judgment for this purpose. The Committee discussed various alternatives to the ALP such as seeking change for the Ninth Circuit's holding, either through further litigation and scholarly publications or through Congressional action. The Committee's consensus was that the California statutory approach, though not a "whole loaf" from a policy standpoint, was the most expeditious route to give effective relief to litigants burdened by the decision.

The Committee also considered Molly's draft revisions to proposed Comment 1 to the ALP's draft statute. Lisa Fenning suggested strengthening the Comment to more directly say that the Ninth Circuit misinterpreted California law and that the statute was amended to provide relief to litigants. Mark Porter also raised language concerns, the need for a possible cross-reference to Section 483.090 of the California Code of Civil Procedure (nullifying attachment liens in certain bankruptcy circumstances) and matters related to Bankruptcy Code references in part (c) (which he withdrew in light of comment 4). After discussion, the Committee unanimously elected to proceed with an ALP along the lines Dan proposed. Lisa and Molly will work on strengthening Comment 1, and Mark Porter will send proposed language changes to Dan for review. The revised proposal will be circulated by email and if no objections are raised, will be deemed approved.

C. Lis Pendens Project

At Dan's request, the Committee tabled his lis pendens proposal. Dan will consider further the comments to the proposal, reply to them and be ready for discussion at the next meeting. The Committee then interrupted discussion of Legislative projects to receive the ExComm liaison's update.

8. Update from ExComm Liaison.

Rob Harris recapped the questions he was asked to investigate at the last meeting and the answers.

- Q 1: is the SEI an “open meeting”? A: all meetings of the Committee are open meetings, at which the public may attend, but the Committee does not need to advertise the SEI specifically as an “open meeting”.
- Q 2: When are the updated Membership Matrices due. A: January 25, 2005. Rob is to email to old document format to the Chair.
- Q 3: Is ExComm approval required to co-sponsor programs? A: Yes.
- Q 4: Is Eric Sagerman still a member of the Committee? A: No.
- Q 5: Can purchasers of programs on the State Bar webcasts be given the ability to stop, restart and bookmark during their review of purchased programs. A: Yes, they can already do this.
- Q 6: Would Susan Orloff be willing to pass to the Committee email bounce information on eBlasts to alert us to invalid addresses on the constituency list. A: Yes, the Committee should identify to Susan the person to receive the bounce information.
- Q 7: Is the California Legislative Bulletin still published. A: No. Peter Szurley is checking to be sure, but the BLN and the Annual Review are supposed to take its place.
- Q 8: Would the Bar accept payment for programs with private CLE vendors. A: Yes, but it may be difficult to get Bar Sponsored CLE certification and may require use of 3rd party certification. In addition, it is not clear whether approval would be extended to use the Committee’s name in conjunction with another presenter and it would require ExComm consent.

With regard to the Annual Officer Report, the Chair asked Rob to find out the due date and whether anything is being done on these reports by other committees. Rob will inquire of Suzanne Graeson but suggested the report would provide opportunities for the Committee and should be completed and submitted with time for the Chair to appear before ExComm. The Chair expressed his preference to do so in Los Angeles, if possible.

Rob also commended the Committee for the Bankruptcy Law eNews and the Chair specifically for designing the format and sending several updates over the last month. Others members of the Committee also congratulated the Chair on this as well. Rob noted other committees and ExComm had noted and responded favorably to the creation of the eNews and encouraged the Committee to continue using the format to publish updates. Dan Schechter indicated he writes updates frequently on bankruptcy topics and will check with his publisher to see if he can make his commentary available for eNews.

Finally, Rob discussed the Membership Review Matrix and its collection of data on age and race. Some of the members have not disclosed this information. The Committee agreed that unless the

Chair hears otherwise, those who have not disclosed will be deemed to have no desire to disclose further. The Committee then returned to the subject of Legislative business.

9. Legislation and Current Projects (continued).

A. Intellectual Property as Security.

Mark Porter raised the question of whether there was any point in pursuing a legislative fix (from Congress) on the uncertainty surrounding perfection of security interests in certain intellectual property. He indicated awareness that this had been attempted before without success and asked if, in light of revisions to Article 9 adopted in 2001, such a fix might be possible now. Members agreed that fix was desirable but expressed skepticism that the Committee had sufficient leverage, alone or with others, to obtain any change. However, it was suggested that Mark check with Bob Anderson and the Intellectual Property Section and report back on their views on pursuing this.

B. Model Real Estate Order

Paul Pascuzzi indicated there were no further developments on the Model Real Estate Order following Ben Young's letter, in his capacity as Northern District Bench and Bar Liaison, to the judges of the Northern District about their proposed guidelines. Paul will follow up with Ben.

C. State Bills.

Mike Koch then reported no movement on bills the Committee has been tracking. The following report is copied from the November minutes for ease of reference.

i. State Bills.

AB 3103 is still in front of the Assembly Judiciary Committee.

Nothing new is known about the efforts to repeal the Bulk Sales Law or plans this year to move it forward. Mike will inquire.

ii. Federal Bills.

S832: Amending the preference and fraudulent conveyance provision concerning officer compensation, was referred to the Senate Judiciary Committee over one year ago and no further action has been taken.

HR 2120: Netting provisions included in B.A.R.F., is on the House Calendar for 2004.

S1264: Reauthorizing FCC and effectively overruling *Nextwave*, is on the Senate Calendar but no action has been taken in over 12 months.

S1331: Cancellation of indebtedness measure in response to WorldCom bankruptcy, was referred to the Senate Finance Committee in June 2003 without further action.

S1920: Amending Chapter 12, passed the House and the Senate and is in conference.

S1970: Bankruptcy Fairness Act, also aimed at recovering excessive officer compensation by amending fraudulent transfer and preference statutes, referred to the Senate Judiciary Committee over one year ago and no further action taken.

HR 4571 Amending Rule 11, passed the House and was referred to a Committee of the Senate.

(HR 4247 and S2278): To split the Ninth Circuit into three separate Circuits, (have been referred to Committees in their respective chambers) and the Committee will keep tracking the bill.

C. CLRC.

With regard to the CLRC project on mechanics lien law, Mike Koch indicated that the draft report has been discussed by the Commission at its last meeting and that a new draft is to be circulated. With regard to the Assignment for the Benefit of Creditors project, Mark Porter inquired of David Gould on the California ABC survey, and found that David was preparing a draft report and viewed the Committee as a conduit to the outside world for initial commentary. David expects the report to be done by the end of December and will send it to Mark for review; Mark has suggested formation of an ad hoc subcommittee of the Committee to comment on it. Donna Parkinson and Bob Franklin indicated interest in reviewing the report. The Commercial Law League has taken no further steps on their proposal to the NCCUSL regarding a Uniform ABC Act, but the project is still on the League's list. Mike indicated there was nothing to report on the privilege waiver initiative.

D. Secret Liens

The Chair noted his continuing attempts to obtain from the UCC Committee their compendium on secret liens so that the Committee can determine how to proceed on this project.

10. Publications.

With regard to the Annual Legislative Review, Dan Schechter noted he would provide information that was sent to the BLN but it would not include statutory matters. A volunteer will be sought to cover legislative developments.

11. Website and Constituency Report.

A. Web Update.

Bob Franklin presented a page-by-page review of the Website. The Committee's meeting schedule should be posted. With regard to "News from ILC", Bob will see if links to eNews can be established. The Membership Roster needs updating, but a formatting issue from the Section is apparently holding it up. With regard to the Programs and Publications, materials related to the January meeting will be posted and Elizabeth Berke-Dreyfuss will help Bob with this. At present, the site makes the Model Real Estate Order available, but not the "instructions for use". The Committee determined to wait for comments from the Northern District Bankruptcy Judges on their order project and request ExComm approval to post the updated order and instructions for use. Bob Franklin will speak with Rob Harris on the status of the existing order. Under "New Legislation", the 2003 WARN Act currently appears. Mark Porter suggested that projects of the Legislative Subcommittee and a list of bills it is monitoring be posted, and Mike Koch will work with Bob on this.

B. Constituency Lists

The Chair inquired if the proposal to obtain a constituency list of bankruptcy professors had been successful. Mark Porter indicated Dan Schechter had attempted to obtain a list from AALS, but that it contained 2,000 names, including business professors. Mark suggested that another attempt be made to identify Debtor/Creditor instructors through AALS, and Dan will look into it. If the list is developed, it should be sent to the Chair.

C. Mini-Articles

The Chair noted the need for “mini-Articles” to keep the Bankruptcy Law eNews going.

12. Bankruptcy Law Advisory Commission.

The Committee then discussed ongoing efforts to establish better communication with the Bankruptcy Law Advisory Commission following the change in its bankruptcy certification without notice to the Committee or solicitation of its input. Sharon Dutton relayed her impressions after speaking with Marie Hogan. Members who had reviewed the certification requirements indicated that no business Chapter 11 attorneys would ever have sufficient volume to qualify for certification. This fact was apparently raised with Wes Avery, Chairman of the Commission, but met with lack of interest. Barry Glaser will contact Wes Avery to attempt open a dialog.

13. New Business.

The Chair noted two recent opinions from the Southern District of California in *In re Garcia*, case no. 03-06041-H7, entered November 22, 2004, and *In re Pacific Wood Designs, Inc.*, case no. 02-12292-H7, entered October 20, 2004. These opinions concern the allowability of fees for trustees’ counsel for services arguably to be performed by trustees themselves. Lisa Fenning indicated that the Bankruptcy Judges of the Central District of California struggled with allowability issues concerning such fees for three years and finally issued negotiated guidelines on the subject. Other members commented on various aspects of the compensation issues raised in the cases. Mark Porter suggested that someone with experience representing trustees write a short article for an eNews on the cases, note they raise compensation issues of ongoing contention and mention the Central District Guidelines. Donna Parkinson volunteered to write an article on the opinion.

14. Adjournment.

The meeting was adjourned at approximately 12:35 p.m.

Mark Porter, Secretary